SURE CATCH FISHING TACKLE MFG SDN BHD A

v.

LILY NG & ANOR

HIGH COURT MALAYA, JOHOR BAHRU B
JEFFREY TAN J
[ORIGINATING SUMMONS NO: 25-16-2005]
12 NOVEMBER 2008

LABOUR LAW: *Industrial Court - Award - Application to quash - Constructive dismissal - Whether proven - Conduct of applicant - Whether a reasonable tribunal would have concluded that 1st respondent dismissed - Whether Industrial Court's decision could not be supported* C

This was an application by the applicant to quash the Industrial Court's award deciding that the 1st respondent was constructively dismissed without just cause and excuse. The award was made on the 2nd representation of the 1st respondent to the Director-General of Industrial Relations. Before that, on 15 January 2001, the 1st respondent had made an earlier representation that she was constructively dismissed, which representation was amicably settled before the Industrial Court on 16 February 2001. Pursuant to the terms of settlement, the 1st respondent reported to work on 19 February 2001, where was instructed to meet the applicant's managing director, one Toh Lim Mok ('TLM'). At TLM's office, an argument broke out between the two of them and TLM told the 1st respondent "you get out of my office". On that same day, the 1st respondent claimed constructive dismissal for the 2nd time. Her subsequent letter to the applicant seeking clarification went unanswered. The Industrial Court found in favour of the 1st respondent, resulting in the present application. D E F G

Held (allowing the application):

(1) The 1st respondent's pleaded case was that she "considered herself dismissed" by reason of the events of 19 February 2001. Hence, only the events on that date were relevant at the 2nd representation. All that had transpired before, amicably settled on 16 February 2001, was really water under the bridge. (para 17) H I

(2) It was the 1st respondent's testimony that TLM gave two alternatives to her, either to resign or be sacked. She further averred that TLM gave certain documents to her to sign, and that TLM said to her "you get out of my office" when she refused to sign those documents without first reading the contents. This court would not disturb findings of fact. So, let it be accepted that TLM's conduct was indeed as alleged. If that were so, then TLM threatened the 1st respondent with the sack. But the fact of the matter was that the 1st respondent was not sacked. The threat, not followed through, was nothing but a hollow threat and, at most, amounted to gross intimidation. Nevertheless, it was still short, certainly of any actual dismissal, or of any conduct that could reasonably evince that the applicant had held itself not bound to the contract of employment. As for the words "you get out of my office" uttered by TLM, they were certainly uncouth and uncivil but could not be construed as words conveying the effect of dismissal. Even when TLM's threat and words were taken together, they were still not enough to prove that the applicant had repudiated the contract of employment. Despite the fact that the applicant saw it fit not to reply to the 1st respondent's letter, there was no fundamental breach. Based on the events of 19 February 2001, the applicant's total conduct was not any act of oppression or victimisation that amounted to constructive dismissal. (paras 18 & 19)

(3) A reasonable tribunal would not have reached the conclusion that the 1st respondent was dismissed in the first place. Given that the reasoning was flawed with Wednesbury unreasonableness, in that the proper inferences were not drawn from the conduct of TLM, the Industrial Court's decision could not be supported. Accordingly, the award of the Industrial Court should be quashed. (paras 20 & 21)

Case(s) referred to:

Ang Beng Teik v. Pan Global Textile Bhd Penang [1996] 4 CLJ 313 CA ***(refd)***

Anwar Abdul Rahim v. Bayer (M) Sdn Bhd Sdn Bhd [1998] 2 CLJ 197 CA ***(refd)***

Holiday Inn, Kuching v. Elizabeth Lee Chai Siok [1992] 1 CLJ 141; [1992] 2 CLJ (Rep) 521 HC ***(refd)***

Pan Global Textiles Bhd Pulau Pinang v. Ang Beng Teik [2002] 1 CLJ 181 CA ***(refd)***

Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9 CA ***(refd)***

Sapax Ltd v. Harrison [1980] 1 RLR 422 ***(refd)***
Roseli Kundor v. Kelantan State Economic Development Corporation [1997] 3 CLJ Supp 470 HC ***(refd)***
Talasco Insurance Sdn Bhd v. Industrial Court of Malaysia & Anor [1997] 4 CLJ 97 HC ***(refd)***
Wong Chee Hong v. Cathay Organisation Malaysia Sdn Bhd [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 SC ***(refd)***
Western Excavating (ECC) Ltd v. Sharp [1978] 1 RLR 27 ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 20

Employment Protection Act 1978 [UK], s. 55(1)(c)

For the applicant - Pravin Kaur Jessy; M/s Jessy & Assoc
For the defendant - Ng Thian Woon; M/s Jackson & Masacorale

Reported by Suresh Nathan

JUDGMENT

Jeffrey Tan J:

[1] This is an application to quash the award of the Industrial Court who found that the 1st respondent was constructively dismissed, but of course, and without just cause or excuse. The award was made on the 2nd representation of the 1st respondent to the Director-General of Industrial Relations.

[2] Before that, on 15 January 2001, the 1st respondent had made an earlier representation (1st representation) that she was constructively dismissed. On that occasion, the 1st respondent complained that she was not given maternity leave for October 2000, wages for November 2000 and December 2000, and bonus for the year 1999. But that 1st representation was amicably settled (see pp. 2 & 3 of the award) before the Industrial Court on 16 February 2001, upon the following terms:

(a) Bahawasanya syarikat bersetuju melantik semula yang menuntut dan yang menuntut dikehendaki melapor diri untuk bekerja pada 19.2.2001.

(b) Syarikat akan membayar tunggakan gaji yang menuntut bagi bulan Oktober 2000, November 2000, December 2000 dan Januari 2001 sebelum 5.3.2001. Pembayaran akan dilakukan menggunakan cek dan akan diserahkan di Jabatan Perhubungan Perusahaan Johor Bahru.

[3] Pursuant to those terms of settlement, the 1st respondent duly reported for work on 19 February 2001. But something happened between the parties on that fateful day that led the 1st respondent to make this 2nd representation that she was again constructively dismissed on 19 February 2001.

[4] The parties gave different accounts of the events of 19 February 2001 to the Industrial Court. According to the 1st respondent (see p. 11 of encl. 11), when she arrived at the factory (her place of work), she was instructed, by one Hayati, to await the arrival of the managing director (Toh Lim Mok – TLM) of the applicant, and not to take her usual station. TLM printed some documents (which were letters) and asked her to sign them. She wanted to read those documents but TLM refused to allow her to do so. She asked Hayati if she (Hayati) would sign those documents without reading them. Hayati remained quiet. Hayati just looked at her and TLM. TLM told her (1st respondent) to get out of his office. TLM then instructed Fatimah to courier those letters to her house. The following day, she received those documents. When she refused to sign those letters, TLM said she must sign them. She said to TLM that she would not sign those letters if she was not allowed to read them. TLM then shouted at her "whether you want to sign or not" ... "in a very high tone". The 1st respondent threatened to sack her – "either I resign on my own or the company will terminate me". After TLM had asked her to get out, she retreated to the production office and cried. About half an hour later, she left the factory. Under cross-examination, the 1st respondent agreed that TLM only asked her to get out of his office and not the company (see p. 11 of encl. 11). The 1st respondent also revealed that from the production office she proceeded to a neighbouring factory. "I just walk off. I just left the company like that."

[5] TLM gave the following, though less dramatic, account to the Industrial Court. During her absence, the company discovered that the 1st respondent had been approving her own leave without prior approval of the company and had been going on leave without any delegation of her duties. The 1st respondent refused to give any explanation for her action, other than to demand her salary. "The situation was very tense and I told her to get out of my office." He did not say to the 1st respondent to get out of the factory premises (see p. 83 of encl. 10). Under cross-examination (see p. 37 of encl. 11), TLM asserted that "get

out of my office" did not mean "get out of the company". He did not clarify that to the 1st respondent, as she "(had) left immediately." A

[6] Before this court, both parties agreed to certain agreed facts (see applicant's outline submission), with agreed facts 1 to 8 being the background facts. Of the relevant, both parties agreed that the 1st respondent reported for work on 19 February 2001, that at the office of TLM an argument occurred between the 1st respondent and TLM, that TLM told the 1st respondent "you get out of my office", and that on that same day the 1st respondent claimed constructive dismissal for the 2nd time. B C

[7] On the day she walked out of the factory, the 1st respondent wrote the following (letter dated 19 February 2001 – see p 7 of the award) to the applicant: D

> In the course of the meeting, your said Mr Toh gave me two alternatives, either to resign on my own accord or be sacked and he gave me documents and forced me to sign the same.
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> He told me to sign certain documents and I told him I refused to do so without reading the contents of the documents. E
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> Upon my refusal to sign the documents your said Mr Toh told me 'you can get out of my office'. Therefore I take it that I have been sacked without just cause or reason.

[8] That letter was left unanswered by the applicant. TLM contended that it was not necessary to reply to the aforesaid letter (see p. 37 of encl. 11). The Industrial Court saw it differently: F

> Saya besependapat dengan peguam terpelajar yang menuntut seandainya benar pekataan "you get out of my office" tidak bermaksud syarikat tidak ingin melihat yang menuntut berkerja di syarikat COW1 (TLM) sepatutnya menjawab surat tersebut, bagi memberikan penjelasan apakah sebenarnya maksud perkataan tersebut. Dalam ketiadaan sebarang penjelasan saya berpendapat bahawa yang menuntut tidak silap membuat kesimpulan bahawa COW1 tidak ingin lagi terikat dengan kontrak pekerjaannya. G H

[9] In the following paragraph, the Industrial Court made the finding that the 1st respondent was constructively dismissed on 19 February 2001 – "Berdasarkan alasan-alasan si atas saya berpendapat bahawa … beliau telah dipecat dengan secara konstrutif pada 19 February 2001". I

[10] In relation to the doctrine of 'constructive dismissal', it is eminently instructive to turn to the case of *Wong Chee Hong v. Cathay Organisation Malaysia Sdn. Bhd.* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 where it was authoritatively pronounced by the former Supreme Court per Salleh Abbas LP, that the word "dismissal" in s. 20 of the Industrial Relations Act 1967 should be interpreted with reference to common law. The Supreme Court did not mark the perimeters of the common law. Still, the Supreme Court imparted much and to a large extent settled the law, even to the present. The Supreme Court first elucidated that "it is in connection with the interpretation of s. 55(1)(c) of the English Employment Protection Act 1978 which defines dismissal as "the employee terminates that contract, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct" that the doctrine of constructive dismissal came to be used and then came to be settled, the meaning thereof, in *Western Excavating (ECC) Ltd v. Sharp* [1978] 1 RLR 27, where the English Court of Appeal held that it means no more than the common law right of an employee to repudiate his contract of service where the conduct of his employer is such that the latter is guilty of a breach going to the root of the contract or where he has evinced an intention no longer to be bound by the contract. "In such situations, the employee is entitled to regard himself as being dismissed and walk out of his employment."

[11] The Federal Court further explicated that the common law test of dismissal is a contract test (contract test) and not a conduct test (unreasonableness test), and that an employee cannot automatically terminate the contract when his employer acts or behaves unreasonably towards him.

> The common law has always recognized the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer. It was an attempt to enlarge the right of the employee of unilateral termination of his contract beyond the perimeter of the common law by an unreasonable conduct of his employer that the expression "constructive dismissal" was used. It must be observed that paragraph (c) never used the words "constructive dismissal." This paragraph simply says that an employee is entitled to terminate the contract in circumstances

entitling him to do so by reason of his employer's conduct. But many thought and a few decisions were made that an employee in addition to his common law right could terminate the contract if his employer acted unreasonably. Lord Denning MR, with whom the other two Lord Justices in the case of *Western Excavating (supra)* agreed, reiterated an earlier decision of the Court of Appeal presided by him (see *Marriott v. Oxford and District Co-operative Society Ltd* [1969] 3 All ER 1126) and rejected this test of unreasonableness. In no uncertain terms, the learned Master of the Rolls declared that the test of dismissal in respect of paragraph (c) is a contract test. In his view, the Act draws a distinction between "dismissal," which is in one section, and "unfairness", which is in another section, and moreover the paragraph is using legal connotations, such as the words "notice" and "entitled."

Thus it is clear that even in England, "constructive dismissal" does not mean that an employee can automatically terminate the contract when his employer acts or behaves unreasonably towards him. Indeed if it were so, it is dangerous and can lead to abuse and unsettled industrial relations. Such a proposition was rejected by the Court of Appeal. What is left of the expression is now no more than the employee's right under the common law, which we have stated earlier, and goes no further. Alternative expressions with the same meaning, such as "implied dismissal" or even "circumstantial dismissal", may well be coined and used. But all these could not go beyond the common law test.

... Therefore we cannot see how the test of unreasonableness which is the basis of the much advocated concept of constructive dismissal by a certain school of thought in U.K. should be introduced as an aid to the interpretation of the word "dismissal" in our section 20. We think that the word "dismissal" in this section should be interpreted with reference to the common law principle. Thus it would be a dismissal if an employer is guilty of a breach which goes to the root of the contract or if he has evinced an intention no longer to be bound by it. In such situations, the employee is entitled to regard the contract as terminated and himself as being dismissed. (See *Bouzourou v. The Ottoman Bank* [1930] AC 271 and *Donovan v. Invicta Airways Ltd* [1970] 1 Lloyd's Rep 486.)

In *Bouzourou*'s case an employee would have been entitled, according to the Privy Council, to regard himself as being dismissed if his transfer from one province to another province rendered him exposed to an immediately threatening danger of violence or disease to his person. And in *Donovan*'s case, the

A Court of Appeal held that when the conduct of the employer was such that it rendered the continuance of the employee's service impossible, the latter was entitled to treat the contract as at end and to obtain damages for wrongful dismissal.

B **[12]** Since then, "it has been repeatedly held by our courts that the proper approach in deciding whether constructive dismissal has taken place is not to ask oneself whether the employer's conduct was unfair or unreasonable (the unreasonableness test) but whether 'the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or C whether he has evinced an intention no longer to be bound by the contract'. (See *Holiday Inn Kuching v. Elizabeth Lee Chai Siok* [1992] 1 CLJ 141; [1992] 2 CLJ (Rep) 521 and *Wong Chee Hong v. Cathay Organisation Malaysia Sdn Bhd* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298)": per Mahadev Shankar JCA in *Anwar Abdul* D *Rahim v. Bayer (M) Sdn. Bhd. Sdn Bhd* [1998] 2 CLJ 197; see also *Pan Global Textiles Bhd Pulau Pinang v. Ang Beng Teik* [2002] 1 CLJ 181, where the Federal Court per Ahmad Fairuz FCJ, as he then was, again affirmed that the common law test is the contract test.

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[13] The Court of Appeal, per Gopal Sri Ram JCA, in *Ang Beng Teik v. Pan Global Textile Bhd, Penang* [1996] 4 CLJ 313, imparted the following, interspersed with examples of what would be cases of constructive dismissal:

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As we have said, in order for s. 20(1) to bite, a workman must consider himself to have been dismissed without just cause or excuse. As demonstrated, he may treat some conduct on the part of his employer towards him – conduct that falls short of actual dismissal or termination – as amounting to a dismissal … But G there has been no formal dismissal or termination. Yet the workman may have recourse to s. 20. If it were not so, an employer can make a workman's life so intolerable so as to force him to resign and then boldly say that there was no dismissal. Even the common law recognizes that a dismissal may be H disguised as a resignation: see *Stanley Ng Peng Hon v. AAF Pte Ltd* [1978] 1 LNS 186.

Where there is no formal order of dismissal, but there is conduct on the part of an employer which makes a workman consider that he has been dismissed without just cause or excuse, lawyers term I such conduct as 'constructive dismissal'. There is no magic in the expression. It is only a convenient label to describe the kind of conduct we have referred to. It could be an order of transfer or

of demotion. Or, it could be that the workman has been made redundant by the employer. Or, it may be a case where the workman is asked to retire. The categories are not, we emphasize, closed.

Where the workman challenges his employer's conduct, it is on the basis that the case is not one eg, of true redundancy but a dismissal disguised as a redundancy or retirement. Or, the challenge may be on the ground that an order of demotion was made in order to force the workman out of his job. It is only when such a challenge is mounted that the question becomes germane. Whether the conduct complained of was in truth a dismissal cloaked as something else is a question of fact. But the facts must disclose that the particular workman considered that he was dismissed by the particular act – eg, of demotion.

(see *Amanah Butler (M) Sdn Bhd v. Yik Chee Wah* [1997] 2 CLJ 79, where the Court of Appeal per Gopal Sri Ram JCA, restated that the term constructive dismissal is just a convenient label)

[14] The Court of Appeal in *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9 per Gopal Sri Ram JCA further illustrated constructive dismissal as follows:

An employer does not like a workman. He does not want to dismiss him and face the consequences. He wants to ease the workman out of his organisation. He wants to make the process as painless as possible for himself. He usually employs the subtlest of means. He may, under the guise of exercising the management power of transfer, demote the workman. That is what happened in *Wong Chee Hong*. Alternatively, he may take steps to reduce the workman in rank by giving him fewer or less prestigious responsibilities than previously held. Generally speaking, he will make life so unbearable for the workman so as to drive the latter out of employment. In the normal case, the workman being unable to tolerate the acts of oppression and victimisation will tender his resignation and leave the employer's services. The question will then arise whether such departure is a voluntary resignation or a dismissal in truth and fact.

[15] Given that the cases of *Talasco Insurance Sdn Bhd. v. Industrial Court of Malaysia & Anor* [1997] 4 CLJ 97, *Sapax Ltd v. Harrison* [1980] 1 RLR 422, *Roseli Kundor v. Kelantan State Economic Development Corporation* [1997] 3 CLJ Supp 470, and *Quah Swe Khoon v. Sime Darby* [2001] 1 CLJ 9 (all applied the contract test) were considered by the Industrial Court, there was no issue of the wrong test being applied. But the mere application

of the right test was but one part of the judicial exercise. There remained the question of whether a reasonable tribunal, being properly appraised of the facts, would have reached such a conclusion that the 1st respondent was indeed dismissed in the first place.

[16] The facts were not many. The pleaded facts (see para 6 of the statement of case) were that the 1st respondent, when she reported to work on 19 February 2001, was given two alternatives, either to resign on her own accord or be sacked, that the 1st respondent was given certain documents to sign, that TLM said to the 1st respondent, upon her refusal to sign those documents, "you can get out of my office", and that thereupon the 1st respondent considered herself dismissed.

[17] In the same said para 6, the 1st respondent notably pleaded that her aforesaid letter dated 19 February 2001 stated "the events that led to (her) conclusion that the company had clearly evinced a desire ... to be no longer bound by the contract of employment". Incidentally, the events stated in that letter dated 19 February 2001 were exactly as pleaded in para 6 of the statement of case, nothing more and nothing less. Hence, there could be no doubt about it. The pleaded case of the 1st respondent was that she "considered herself dismissed" by reason of the events of 19 February 2001. The 1st respondent had confined herself to the events of 19 February 2001. Hence, only the events on 19 February 2001 were relevant at the 2nd representation. All that had transpired before, all amicably settled on 16 February 2001, were really water under the bridge.

[18] Now, in relation to the events on 19 February 2001, would a reasonable tribunal have found that the total conduct of TLM evinced an intention not to be bound by the contract of employment, and or that the 1st respondent was constructively dismissed? It was the testimony of the 1st respondent, that TLM gave two alternatives to her, to resign or be sacked, that TLM gave certain documents to her to sign, and that TLM said to her "you get out of my office" when she refused to sign those documents without first reading the contents.

[19] This court would not disturb findings of fact. So, let it be accepted that the conduct of TLM was indeed as alleged. If that were so, then TLM threatened the 1st respondent with the sack. But the fact of the matter was that the 1st respondent was not

sacked. The threat, not followed through, was nothing but a hollow threat. At most, it amounted to gross intimidation. Nevertheless it was still short, certainly of any actual dismissal, or of any conduct that could reasonably evince that the applicant had held itself not bound to the contract of employment. The 1st respondent might have been gravely humiliated, but that threat of the sack, no matter how unreasonable and or uncalled for, was not any actual and or constructive dismissal. As for the words "you get out of my office" when the 1st respondent refused to sign certain documents without first reading the contents, they were certainly uncouth and uncivil, but yet could not be construed as words conveying the effect of dismissal. Even when taken together, the threat and the words of TLM, it was still not enough to reasonably evince that the applicant had repudiated the contract of employment. There was an altercation. Tension was in the air. The conduct of TLM could have been unreasonable. Yet, there was no fundamental breach, which remained so in spite of the fact that the applicant saw it fit not to reply to the 1st respondent. Based on the events on 19 February 2001, the total conduct of the applicant was not any act of oppression or victimisation that amounted to constructive dismissal.

[20] A reasonable tribunal would not have reached a conclusion that the 1st respondent was dismissed in the first place. A reasonable tribunal would not have reached a conclusion that the total conduct of the applicant was such that the 1st respondent could not be expected to perform her end of the contract of employment. Based on the words "you get out of my office", it could not be concluded that the 1st respondent had been dismissed. The intention of the applicant had yet not been shown. That would have been the conclusion of a reasonable tribunal.

[21] All findings of fact remained undisturbed. But given that the reasoning was flawed with *Wednesbury Unreasonableness*, in that the proper inferences were not drawn from the conduct of TLM, the decision of the Industrial Court could not be supported. Accordingly, and for the reasons given herein, the award of the Industrial Court is hereby quashed, with costs ordered in favour of the applicant.